

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Charging Party,

and

XPO CARTAGE, INC.

**Case Nos. 21-CA-150873
 21-CA-164483
 21-CA-175414
 21-CA-192602**

Respondent.

**RESPONDENT XPO CARTAGE INC.'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE CHRISTINE E. DIBBLE'S DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent XPO Cartage, Inc. ("Respondent") respectfully submit their Exceptions to the September 12, 2018 Decision ("Decision") of Administrative Law Judge ("ALJ") Christine E. Dibble.

EXCEPTIONS

1. ALJ Dibble erred in finding that the Owner-Operator drivers were employees under the National Labor Relations Act. (Decision at 12:26- 24:14.) This finding is not supported by the evidence or the law.
2. ALJ Dibble erred in finding that Respondent unlawfully interrogated, solicited employee complaints and grievances, and promised increased benefits and improved working conditions in violation of the National Labor Relations Act. (Decision at 34:25-35:42; 37:7-37:38.) This finding is not supported by the evidence or the law.

3. ALJ Dibble erred in finding that Respondent violated the National Labor Relations Act by denying Domingo Avalos's loan request. (Decision at 50:2-54:3.) This finding is not supported by the evidence or the law.

4. ALJ Dibble erred in finding that "the party asserting that individuals are independent contractor[s], and thus are not covered under the Act has the burden of proof." (Decision at 13:1-2.) This finding is not supported by the evidence or the law.

5. ALJ Dibble erred in finding that Respondent maintains significant control over the drivers' work. (Decision at 14:17.) This finding is not supported by the evidence or the law.

6. ALJ Dibble erred in finding that the "requirement that the trucks are branded in the Respondent's name when delivering for its clients" supports the finding that Respondent maintains significant control over the drivers' work. (Decision at 14:22-23.) This finding is not supported by the evidence or the law.

7. ALJ Dibble erred in finding that the "extent of control by employer" factor weighs in favor of employee status. (Decision at 15:27.) This finding is not supported by the evidence or the law.

8. ALJ Dibble erred in finding that "The Respondent could not perform its function without the drivers" (Decision at 17:7-8.) This finding is not supported by the evidence or the law.

9. ALJ Dibble erred in finding that "to the casual observer, most likely, the driver and truck are indistinguishable from the Respondent." (Decision at 17:9-10.) This finding is not supported by the evidence or the law.

10. ALJ Dibble erred in finding that the factor of "whether drivers are engaged in a distinct occupation or business, and whether the drivers' work was part of Respondent's regular

business” weighs in favor of employee status. (Decision at 17:12.) This finding is not supported by the evidence or the law.

11. ALJ Dibble erred in finding that “The Respondent, however, supplies the chassis...” (Decision at 18:25.) This finding is not supported by the evidence.

12. ALJ Dibble erred in finding that “Despite the contract, the facts in evidence establish that, in practice, the drivers expected and were retained for an indefinite period and not on a job-to-job basis.” (Decision at 19:10-11.) This finding is not supported by the evidence or the law.

13. ALJ Dibble erred in finding that Respondent’s argument that because a small portion of drivers were able to negotiate a change in their compensation favors independent contractor status was rendered meritless. (Decision at 19:30-33.) This finding is not supported by the evidence or the law.

14. ALJ Dibble erred in finding that “there are more indicia favoring employee status...” (Decision at 19:36-37.) This finding is not supported by the evidence or the law.

15. ALJ Dibble erred in finding that the length of time drivers were employed favors employee status. (Decision at 19:13.) This finding is not supported by the evidence or the law.

16. ALJ Dibble erred in finding that the method of compensation factor weighs in favor of employee status (Decision at 19:42.) This finding is not supported by the evidence or the law.

17. ALJ Dibble erred in finding that the factor of whether the employees believe they are creating an employer-employee relationship weighs in favor of employee status. (Decision at 22:14.) This finding is not supported by the evidence or the law.

18. ALJ Dibble erred in finding that “there was no substantial distinction between [Respondent’s] core businesses and the function of the drivers.” (Decision at 22:19-22:20.) This finding is not supported by the evidence.

19. ALJ Dibble erred in finding that the factor of “whether the principal is or is not in the business” weighs in favor of employee status. (Decision at 22:22.) This finding is not supported by the evidence or the law.

20. ALJ Dibble erred in finding that “the facts are clear that the actual opportunity to work simultaneously for another company and Respondent does not exist...” (Decision at 23:13-14.) This finding is not supported by the evidence or the law.

21. ALJ Dibble erred in finding that the Owner-Operator drivers did not have “true control over hiring the second seat driver...” (Decision at 23:24-25.) This finding is not supported by the evidence or the law.

22. ALJ Dibble erred in finding that “the drivers had no substantive ownership interest in the work” (Decision at 23:31.) This finding is not supported by the evidence.

23. ALJ Dibble erred in finding that “even the small number of drivers who had second seat drivers or more than one truck had no significant proprietary interest in the overall business” (Decision at 23:32-34.) This finding is not supported by the evidence.

24. ALJ Dibble erred in finding that the “significant entrepreneurial opportunity for gain or loss” factor weighs in favor of employee status. (Decision at 23:36.) This finding is not supported by the evidence or the law.

25. ALJ Dibble erred in finding that there are more factors in the analysis favoring employee status than independent contractor status. (Decision at 23:45.) This finding is not supported by the evidence or the law.

26. ALJ Dibble erred in finding that “the drivers are not engaged in a distinct occupation or business, but rather work as a part of the Respondent’s regular business.”

(Decision at 24:3-4.) This finding is not supported by the evidence or the law.

27. ALJ Dibble erred in finding that “the drivers are, in practice, retained for an indefinite period.” (Decision at 24:4-5.) This finding is not supported by the evidence or the law.

28. ALJ Dibble erred in finding that “Respondent is in the same business as the drivers.” (Decision at 24:5-6.) This finding is not supported by the evidence.

29. ALJ Dibble erred in finding that the “drivers do not have a significant entrepreneurial opportunity for gain or loss.” (Decision at 24:6.) This finding is not supported by the evidence or the law.

30. ALJ Dibble erred in finding that the drivers were employees protected by the Act during the relevant period. (Decision at 24:8-24:9.) This finding is not supported by the evidence or the law.

31. ALJ Dibble erred in “credit[ing] Canales’ version of the May 5, 2015 conversation [Canales] had with Flores.” (Decision at 35:27-28.) This finding is not supported by the evidence.

32. ALJ Dibble erred in finding that the “evidence supported Canales’ version of his conversation with Flores on May 5, 2015...” (Decision at 37:7-8.) This finding is not supported by the evidence.

33. ALJ Dibble erred in finding that Respondent “unlawfully interrogated Canales, solicited employee complaints and grievances, and promised increased benefits and improved

working conditions” in violation of the National Labor Relations Act. (Decision at 37:9-37:11.)

This finding is not supported by the evidence or the law.

34. ALJ Dibble erred in “credit[ing] Canales’ testimony that Flores asked him a series of questions that were directed at determining Canales’ and other driver’s level of union involvement and support.” (Decision at 37:11-12.) This finding is not supported by the evidence.

35. ALJ Dibble erred in finding “Flores encouraged and admitted that he asked Canales to specify his grievances against the company and ways the company could improve the drivers’ working conditions. This was said in the context of Flores’ overall attempts to gauge Canales’ and other drivers’ level of union involvement..” (Decision at 37:13-16.) This finding is not supported by the evidence.

36. ALJ Dibble erred in “finding Flores promised that he would try to alleviate some of Canales’ financial burdens. Simply because Flores may not have possessed the authority to keep the promise, it does not negate the fact that he knowingly made the promise in an attempt to influence Canales’ (or other drivers’) level of union support.” (Decision at 37:17-20.) This finding is not supported by the evidence.

37. ALJ Dibble erred in “find[ing] Respondent has violated paragraphs 11(a) and 11(b) of the complaint.” (Decision at 37-38.) This finding is not supported by the evidence or the law.

38. ALJ Dibble erred in finding that “union animus was a motivating factor in the Respondent’s decision to deny Avalos’s loan request.” (Decision at 53:27-53:28.) This finding is not supported by the evidence or the law.

39. ALJ Dibble erred in finding that “Several emails that Camacho sent to the ultimate decision-makers clearly document his concerns about the Respondent approving the loan because of Avalos union activity.” (Decision at 53:30-31.) This finding is not supported by the evidence.

40. ALJ Dibble erred in finding that “Moreover, despite its irrelevance to Avalos’ loan request, Camacho repeatedly mention in those emails Avalos[’] active involvement in the union.” (Decision at 53:33-33.) This finding is not supported by the evidence.

41. ALJ Dibble erred in finding “Respondent violated the Act as alleged in paragraph 17(a) of the complaint.” (Decision at 54:2-3.) This finding is not supported by the evidence or the law.

42. ALJ Dibble erred in recommending the remedies set forth in the Decision (Decision at 54:32-55:3.) These remedies are not supported by the evidence or the law.

43. ALJ Dibble erred in recommending the order set forth in the Decision (Decision at 55:10-56:19.) This order is not supported by the evidence or the law.

Respectfully Submitted,

/s/ Joseph A. Turzi
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Dated: November 13, 2018